PD-0921-18
COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS
Transmitted 1/23/2019 5:06 PM
Accepted 1/24/2019 12:57 PM
DEANA WILLIAMSON
CLERK

No. PD-0921-18

FILED
COURT OF CRIMINAL APPEALS
1/24/2019
DEANA WILLIAMSON, CLERK

**IN THE**

# TEXAS COURT OF CRIMINAL APPEALS

**MICHAEL J. BUCK,**

*Appellant,*

**v.**

**THE STATE OF TEXAS,**

*Appellee.*

On Discretionary Review from
Cause No. 08-16-00294-CR, affirming the conviction in
Cause No. 20160D01234 in the 243rd Judicial District Court of El Paso County, Texas

## APPELLANT'S BRIEF

**El Paso County Public Defender**
Attorneys for the Appellant

**NICHOLAS C. VITOLO**
Deputy Public Defender
State Bar No. 24084526
500 E. San Antonio, Room 501
El Paso, Texas 79901
TEL (915) 546-8185, Ext. 3436
FAX (915) 546-8186
nvitolo@epcounty.com

## NAMES OF PARTIES AND COUNSEL

| | | |
|---|---|---|
| 1. | **APPELLANT/PETITIONER** | **MICHAEL J. BUCK** |
| | APPELLATE COUNSEL | NICHOLAS VITOLO<br>Assistant Public Defender<br>El Paso County Public Defender<br>500 E. San Antonio, Suite 501<br>El Paso, TX 79901 |
| | TRIAL COUNSEL | THERESA CABALLERO<br>Attorney at Law<br>300 E. Main Street, Suite 1136<br>El Paso, TX 79901 |
| 2. | **APPELLEE/RESPONDENT** | **THE STATE OF TEXAS** |
| | APPELLATE COUNSEL | STACEY SOULE<br>P.O. Box 13046<br>Austin, Texas 78711<br><br>JAIME ESPARZA<br>District Attorney<br>500 E. San Antonio, 2nd Floor<br>El Paso, TX 79901 |
| | TRIAL COUNSEL | RAMON GALLEGOS<br>R. SCOTT FERGUSON<br>Assistant District Attorneys<br>500 E. San Antonio, 2nd Floor<br>El Paso, TX 79901 |
| 3. | **243RD DISTRICT COURT** | **JUDGE LUIS AGUILAR** |
| 4. | **EIGHTH COURT OF APPEALS** | **CHIEF JUSTICE ANN MCLURE**<br>**JUSTICE YVONNE RODRIGUEZ**<br>**JUSTICE GINA PALAFOX** |

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

### Cases

## Statutes & Rules

## STATEMENT OF THE CASE

On March 22, 2016, the State of Texas indicted Mr. Buck for two counts of aggravated sexual assault. (CR: 8-9.) After a number of pretrial hearings, Mr. Buck set his case for trial. (RR: 23.) On the date of trial and after Buck confirmed his desire to have a trial, Buck entered an open plea of guilty to the trial court. (RR: 27, 37-38.) The trial court sentenced him to 23 years in prison, and the Eighth Court of Appeals affirmed. (RR: 128); *Michael Buck v. The State of Texas*, 08-16-00294-CR (Tex. App.—El Paso, Aug. 2, 2018 – not designated for publication).

Issues relating to Mr. Buck's guilty plea form the basis of this appeal.

## STATEMENT REQUESTING ORAL ARGUMENT

This Court granted review without oral argument.

## GROUNDS FOR REVIEW

**(1)** By holding that Michael's waiver of the right to appeal was enforceable and that the trial court's "admonishment" that induced Michael to plead guilty did not violate Due Process and Article 26.13, the Eighth Court's opinion conflicts with decisions from this Court and the United States Supreme Court.

**(2)** By holding that Michael's waiver of the right to appeal was enforceable and by ruling that the trial court's misstatements about its ability to cumulate the sentences—made as it sought to induce Michael to plead guilty—did not invalidate the plea, the Eighth Court's opinion creates direct conflicts with other courts of appeals on issues now pending before this Court.

**(3)** By relying directly on bad/outdated law for the timing of an election and on the impossible scenario of the court sentencing Michael even if he pleaded guilty to the jury to reject Michael's appeal, and by not addressing Michael's argument that the trial court coerced him to plead guilty after he said he wanted a trial on trial day, the Eighth Court's opinion departs from an acceptable course of judicial proceedings and calls for this Court to exercise its power of supervision.

## STATEMENT OF FACTS

From arraignment through sentencing, Michael Buck had seven hearings before the Honorable Judge "King" Luis Aguilar. For the purposes of this case, the "trial" hearing on September 19 is especially important.

**September 19, 2016 – Jury Trial Hearing**

**Part I**

Michael Buck is not present for the morning jury trial hearing. (RR2: 23.) His attorney, Theresa Caballero does not object to Michael's absence. (RR2: 23.)

Caballero addresses the court. (RR2: 23.) On the one hand, she advises the court that her "friend and colleague, Mr. Howard Rubinstein," is present to help her "with the voir dire portion of the trial," suggesting she knows Michael Buck may want to go to trial. (RR2: 23.) On the other hand, she tells the court her "client would like to plea guilty if the court would consider allowing him to plead." (RR2: 23-24.) The judge naturally and correctly responds, "I can't stop him from pleading guilty." (RR2: 24.)

Caballero begins to illuminate the situation: she explains that the plea offer, which had been five years, doubled to ten years. (RR2: 24.) So Caballero was seeking "some guidance" as to whether the trial court would accept a plea offer of ten years. (RR2: 24.) The court refused to commit himself to the State's offer. (RR2: 24.) Caballero cannot say for sure if Michael, who is still absent, will want to plead guilty or go to trial. (RR2: 26.) The judge declares, "either way, either way, he's getting resolved one way or the other." (RR2: 26.)

**Part II (later that day)**

The judge asks the record to reflect that "we had some complications this morning," presumably referring to the Sheriff's failure to bring Michael to court on time for his trial. (RR2: 27.) The judge then addresses Michael directly: "It was my understanding that you were going to enter an open plea of guilt. Is that correct.?" (RR2: 27.)

Michael replies, "No. I'd like to go to trial and defend myself." (RR2: 27.)

The judge initially reacts by telling Michael that the jury panel is no longer available, so the court would have to continue his case "to Friday." (RR2: 27.) Michael says, "All right." (RR2: 27.)

The trial court, however, had already said Michael Buck was "getting resolved" that day, and he meant it. (RR2: 26.) So rather than reset the case for the next week, the judge "explain(s) a couple of things" to Michael. (RR2: 27.)

First, the court confirms that Michael faces two counts. (RR2: 27.) Then, he orders Caballero to explain consecutive sentencing to Michael. (RR2: 27.)

THE COURT: You are here on a first-degree felony. How many counts?

MR. FERGUSON: Two counts, Your Honor.

THE COURT: Two counts. All right. Have you explained the consecutive sentencing to your client, ma'am?

MS. CABALLERO: No, Your Honor.

THE COURT: Okay. Take a minute and do it real quick.

(Short pause.)

THE COURT: Let the record reflect counsel had an off-the-record conversation with her client. Did you understand your attorney's explanation of consecutive sentencing, what's commonly known as stacking?

THE DEFENDANT: Yes, ma'am -- I mean, yes, sir.

THE COURT: Mr. Buck, I also want to point out to you that you have an absolute right to represent yourself. You are looking at five to 99 or life on count 1. You are looking at five to 99 or life on count 2. I'm going to request your counsel be available to you. If you want to proceed pro se, that is your right. I also want to tell you, Mr. Buck, that this Court will hold you to the same standard as I do these two prosecutors who have graduated from law school. Do you understand that?

THE DEFENDANT: Yes, sir.

(RR2: 27-28.)

Thus, after the judge orders Caballero to explain stacking, the court immediately highlights that Michael faces five to ninety-nine years on each count. (RR2: 28.) And shortly thereafter, the judge explicitly states that if the jury were to find Michael guilty on both counts, then "I and I alone will decide whether to stack you." (RR2: 30.)

Michael begins to respond, "I thought the jury had…" But the judge cuts him off: "No, sir." (RR2: 30.) At this point, the prosecutor chimes in, claiming that Michael had already elected to go the judge for punishment after the 28.01 hearing. (RR2: 30.) In fact, there is no election in the record. His claim provokes the judge to "rephrase:"

> "If they find you guilty, I will assess punishment between five and 99 or life on count 1. Then I'll decide count 2, five to 99 or life. Then I will decide whether to stack them or let them run concurrent. I and I alone will make that decision."

(RR2: 30.)

The judge then enlists Ms. Caballero to confirm that the complainant is ready to testify against Michael Buck. (RR2: 30-31.) And, in turn, he reveals the dilemma Michael faces in deciding to exercise his right to a trial: "If they (the jury) do believe her, you have a problem because I am going to sentence you." (RR2: 31.)

This convinces Michael to change his mind. He replies, "Well, in that case, Your Honor, I'd like to go ahead and take the open plea because I thought that the

jury would have the right to assess the punishment." (RR2: 31.) "No, sir, you are mistaken," answers the court. (RR2: 31.)

Finally, and even though Michael had already succumbed to the court and asked to plead, the judge reiterates the choice he is giving Michael:

> "One, on Friday, we will empanel another jury panel. You will go to trial. Two, I cannot stop you from entering a plea to that jury, but the reality is, I will -- if you enter a plea of guilty to the jury, I will instruct them to find you guilty, they will do so, and then you come to me for punishment. *So I don't consider that a viable option.* Or two, you plea guilty today on what we call an open plea, meaning there is no recommendation from the State of Texas to bind the defense, and I will assess an appropriate punishment."

(RR2: 33 – emphasis added.) Given the options the judge made available to Michael, it is not surprising that Michael chose the open plea. (RR2: 33-34.)

**September 20, 2016 – Sentencing**

After listening to evidence, the honorable judge sentenced Michael Buck to 23 years in the Texas Department of Criminal Justice. (RR2: 127-28.)

## SUMMARY OF THE ARGUMENT

The acute impropriety of the trial judge's actions that misled and coerced Michael Buck to plead guilty are obvious. Due process, as well as related safeguards like Article 26.13, and the cases that define its protections for defendants who plead guilty demand more of trial courts. His plea was both involuntary and unknowing, and so it was invalid. The case law reviewed below bears that out forcefully.

The Eighth Court escaped this seemingly inevitable conclusion by writing an opinion that avoids the fundamental issue of the trial court's coercive behavior; endorses the trial court's plain misstatements of law it made to Michael and that he explicitly relied on in deciding to plead guilty; and offers no more than sentence-long legal conclusions without any meaningful support to understand them on the important, decisive issues of waiver and Article 26.13. The Eighth Court's decision below is the rare sort of opinion that calls for this Court's supervisory intervention to correct its departures from acceptable judicial review.

## ARGUMENT

### I. BY HOLDING THAT MICHAEL'S WAIVER OF THE RIGHT TO APPEAL WAS ENFORCEABLE AND THAT THE TRIAL COURT'S "ADMONISHMENT" THAT INDUCED MICHAEL TO PLEAD GUILTY DID NOT VIOLATE DUE PROCESS AND ARTICLE 26.13, THE EIGHTH COURT'S OPINION CONFLICTS WITH DECISIONS FROM THIS COURT AND THE UNITED STATES SUPREME COURT.

As this Brief explains below, Michael's guilty plea violated Due Process and Texas Code of Criminal Procedure Article 26.13. Michael sought to vacate his plea on direct appeal to the Eighth Court of Appeals, but that court upheld Michael's guilty plea and affirmed his conviction and sentence in a deeply flawed opinion. This Brief lays bare the lower court's errors—errors that put its decision flatly at odds with the relevant case law from the Supreme Court, this Court, and other jurisdictions—beginning with the Eighth Court's unsupported claim that Michael waived his right to appeal. The Brief then turns to the lower court's flawed Due Process and Article 26

analyses. These examinations of the opinion below illustrate that the correct application of law to Michael's case calls for his plea of guilty to be overturned.

### A. Michael Retained the Right to Appeal.

While the parties spent fifteen pages in their briefs on the issue of the alleged waiver of Michael's right to appeal, the Eighth Court spends a mere sentence.[1] The Court held, "[w]e further conclude that Appellant's waiver of his right to appeal is not only voluntary, it is enforceable because the waiver was the result of a bargain." Op. at *12-*13. The court points to nothing in the record for support of its bare conclusion. In fact, the record firmly establishes that the parties reached no bargain for the waiver of appeal and that the waiver, like the plea of guilty itself, was involuntary.

#### 1. Michael and the State did not bargain for the waiver.

The alleged waiver is not enforceable because Michael and the State of Texas did not bargain for the waiver of his right to appeal. While a defendant may waive his right to appeal, he must do so voluntarily, knowingly, and intelligently. *Ex parte Delaney*, 207 S.W.3d 794, 796-97 (Tex. Crim. App. 2006). Further, if the defendant waives his right to appeal pre-trial and pre-sentence, then the waiver must result from a bargain. *Ex parte Broadway*, 301 S.W.3d 694, 697-98 (Tex. Crim. App. 2009). *See also Blanco v. State*, 18 S.W.3d 218, 220 (Tex. Crim. App. 2000) (rejecting defendant's

[1] Appellant's Brief at 18-19; Appellee's Brief at 20-25; Reply at 2-8.

attempt to renege on bargain where State upheld its end). The bargain requires consideration, which is the mutuality of obligations involving "a bargained for exchange of promises" with benefits and detriments that induce the agreement. *See Fed. Sign v. Tex. S. Univ.*, 951 S.W.2d 401, 408-09 (Tex. 1997) (defining consideration and noting that contracts that lack consideration are unenforceable). *See also Carson v. State*, 559 S.W. 3d 489 (Tex. Crim. App. 2018). If the record does not show consideration between the parties, then the reviewing court may not enforce the waiver of the right to appeal. *See id.* (declining to overturn precedent requiring consideration for pre-trial, pre-sentence waiver of right to appeal).

In *Carson*, this Court recently affirmed the consideration requirement after reviewing earlier cases concerning pre-trial and pre-sentence waivers of the right to appeal. *Id.* at 494-95. In every case where this Court upheld the waiver, the record evidenced a bargain—complete with consideration—for the court to enforce. For example, in *Blanco* the State agreed to recommend to the trial court a sixteen-year sentence in exchange for the defendant's promise not to appeal. *Id.* at 493. The State followed through with its promise and recommended sixteen-years, which the trial court followed; accordingly, the State could "insist" on receiving its benefit—the defendant's waiver of his appeal—from the bargain. *Id.* Further, in *Ex parte Broadway*, this Court enforced the defendant's waiver because the defendant negotiated with the State and waived his right to appeal to induce it to waive its right to a jury trial. *Id.* at 494. The defendant wanted the State's waiver of jury trial in hopes that the trial judge

would place him on deferred adjudication probation – his benefit from the exchange. *Id.* "The record indicated that the State did not want to consent to waive its right a jury, but it did so in exchange for the defendant's waiver of his right to appeal." *Id.*

After its review of precedent, *Carson* turned to the alleged waiver before it. Carson enforced the waiver agreement because the record showed that the defendant did not want a jury trial, the State had expressly stated it wanted a jury trial if the appellant intended to appeal, the State would not even consent to a bench trial without the waiver, and the defense attorney stated they had "negotiated to get the State to waive a jury." *Id.* at 495-96.

The bargains in these cases exemplify consideration: each party incurred a detriment to receive a benefit from the agreement. In contrast, if one side gets no benefit, then there is no bargain to enforce. Michael's case embodies such a one-sided, non-binding arrangement.

The purported bargain below is that the State waived its right to a jury trial in exchange for Michael waiving his right to appeal. (RR: 39.) Beyond the pronouncement of the bargain, the record contains zero support for it. Three points make the absence of an enforceable bargain clear.

First, Michael received no benefit from the State's waiver as he must have for the Eighth Court's ruling to be correct. Moreover, not only did Michael receive no benefit from the bargain, he actually got exactly what he did not want from it. Michael declared his desire for two things prior to pleading guilty: to go to trial, and to

be sentenced by the jury. (RR: 27, 31.) He got neither, and no right of appeal to boot, according to the Eighth Court of Appeals. If Michael had proceeded to trial, however, even if only to plead guilty to the jury, the jury could have sentenced him. (This points directly to the involuntary and unintelligent nature of Michael's plea and waiver, and there is more on that to come.) In sum, no benefit means no consideration, so the waiver is not enforceable. *Delaney*, 207 S.W.3d at 799-800.

Second, the record shows that Michael was going to enter an open plea of guilty to the judge well before anyone thought of having Michael waive his right of appeal. (RR: 31, 39.) The waiver was tacked on only after Michael agreed to enter an open guilty plea to the judge without any objection by the State or indication that it wanted a trial. (RR: 31, 34-36.) In fact, all the State musters at this time is a meek apology to the trial court for not having plea papers already prepared. (RR: 35-36.) Ultimately, the record reveals that the trial judge chose this path for the parties more so than the parties chose it for themselves. And since the open plea and concomitant waivers do not derive from negotiations between Michael and the State, it cannot be said the sides bargained over them.

Third, this case shares none of the material facts that established consideration in this Court's waiver cases. The State did not recommend a sentence to the judge. *Blanco*, 18 S.W.3d at 219. The State never indicated that it wanted to proceed to trial, nor did it indicate that it did not intend to waive trial. *Carson*, 559 S.W. 3d at 495-96. There were no negotiations over the waiver. *Id.* Finally, Michael received no legal

benefit, such as eligibility for deferred adjudication probation, from entering into the alleged agreement. *Ex parte Broadway*, 301 S.W.3d at 697-98.

For all of those reasons, the lower court's conclusion that the waiver resulted from a bargain is wrong.

**2. The waiver is not binding because it was involuntary.**

Michael's waiver is also unenforceable because it resulted from the trial court's coercion of him to enter an open plea of guilty to the court. Again, a defendant may only waive his right to appeal voluntarily and knowingly. *Ex parte Delaney*, 207 S.W.3d at 796-97 . It follows that if the decision to plead guilty was involuntary or unknowing, then an agreement to waive that right as part of the plea "deal" is not binding. *See Ex parte Reedy*, 282 S.W.3d 492, 500 (Tex. Crim. App. 2009) (holding waiver of right to file habeas claim during plea voidable if plea itself was involuntary). *See also Melton v. State*, 987 S.W.2d 72, 75 n. 2 (Tex. App.—Dallas 1998) (explaining "waiver rule is predicated on a knowing and voluntary plea [and thus] does not apply to bar appeal in open plea cases when a defendant claims plea was involuntary").

This makes sense. For if someone forces you to do some "thing" X (let's say plead), and X necessarily entails Y (let's say sign plea paperwork), then the coercion that relieves you of responsibility for X should also relieve you of responsibility for Y. The endorsement of this principle in *Ex parte Reedy* and *Melton* is no more than an endorsement of common sense.

The predicate question is, therefore, this: was Michael's decision to enter an open plea of guilty to the court voluntary and knowing? In a word, no.

**B. Michael's Plea Violated Due Process.**

Michael's plea was invalid because it was unknowing and involuntary. A defendant's guilty plea must be voluntary and knowing to satisfy due process. *McCarthy v. U.S.*, 394 U.S. 459, 466 (1969). The two requirements are not identical. *Brady v. U.S.*, 397 U.S. 742, 751-58 (1970) (analyzing voluntariness and knowingness components separately).

Although they are distinct, the voluntary and knowing requirements interconnect. For example, the trial judge's false statement to Michael that the jury could not sentence him not only rendered the decision to plead unintelligent, but it also allowed the judge to exploit Michael's misconception of the law and force him to plead by threatening to punish Michael with a harsher sentence should he insist on trial. To reflect that close relationship while maintaining the analytical distinction between the due process components, this section first recounts the main events from Michael's hearing that generated his decision to plead. It then addresses the false statements of law from the hearing to show they precluded Michael from knowingly entering his guilty plea. Finally, it demonstrates that the plea—as a result of the misstatements, threats, and improper judicial intervention—was involuntary. This discussion will ultimately prove to things: the guilty plea violated Due Process, and the Eighth Court erred by affirming it.

**1. The anti-admonishment**

The Grounds for Review refer to the court's statements to Michael before he declared his intent to plead guilty as an "admonishment." It did so to facilitate the discussion, and because the statements shared some qualities with an admonishment. But the purpose of the plea admonishment is "to protect the defendant from an unintelligent or involuntary plea." *Mitchell v. U.S.*, 526 U.S. 314, 322 (1999). The purpose of the trial judge's colloquy with Michael, in contrast, was to convince Michael to plead guilty. To achieve that goal, the judge employed a series of threats and misstatements of law. In that way, it inverted the proper aim of the admonishment: rather than ensuring that the defendant chose to plead guilty voluntarily and knowingly, it coerced the defendant seeking trial to instead plead guilty while misunderstanding the law as it related to his case. Therefore, it makes more sense to term it an anti-admonishment.

The anti-admonishment began after Michael twice declared his intent to go to trial and immediately preceded his open plea of guilty to the trial judge. (RR: 27-38.) What is more, it occurred on Michael's trial setting. (RR: 23-27.)

The anti-admonishment contained the following material facts:

1. After Michael said he intended to go to trial twice, the judge asked Michael's attorney to explain "stacking" to Michael. Michael was not subject to consecutive sentencing (the Eighth Court agrees with this point). (RR: 27-28.)
2. The trial court twice stated that it would decide whether or not to stack the sentences against Michael. (RR: 30.)

3. The trial court told Michael that he had a "problem" if he went to trial and that trial was not a "viable option" because the judge would sentence him, whereas if Michael entered an open plea "today," the judge would give him an "appropriate" sentence. (RR: 31-33.)

4. The trial court told Michael it would sentence him even though Michael had not yet made his election and even if Michael pleaded guilty directly to the jury. (RR: 30-33.)

5. Michael twice expressed his belief that the jury could sentence him and said he decided to enter open plea because he thought the jury could sentence him. (RR: 30-31.)

These facts place the trial court's actions well beyond the pale of constitutional conduct by a judge.

**2. Michael's plea was unintelligent and void.**

Michael's guilty plea was not "knowing" because the trial court—with the assistance of Michael's own attorney and the prosecutor—misled him about the jury's ability to sentence him and the judge's ability to "stack" the sentences against him. A valid guilty plea necessitates that the defendant possessed "a full understanding of what the plea connotes and of its consequences." *Davidson v. State*, 405 S.W.3d 682, 686-87 (Tex. Crim. App. 2013), citing *Boykin v. Alabama*, 395 U.S. 238, 244 (1969) and *Aguirre-Mata v. State*, 125 S.W.3d 473, 475 (Tex. Crim. App. 2003). "To determine whether a defendant's awareness was sufficient at the time of his plea, a reviewing court looks to whether the plea was a voluntary and intelligent choice among the alternative courses of action open to the defendant." *Ex parte Palmberg*, 491 S.W.3d 804, 807 (Tex. Crim. App. 2016) (internal quotations removed), citing *State v. Guerrero*,

400 S.W.3d 576, 588 (Tex. Crim. App. 2013). To exercise this choice, a defendant must be "fully aware of the direct consequences" of the conviction. *See Bousley v. U.S.*, 523 U.S. 614. 619 (1998), citing *Brady*, 523 U.S. at 755.

As this Court and the United States Supreme Court have enforced this due process obligation, a number of principles have emerged. For one, the presence of competent counsel who accurately advises the defendant of the "then applicable law" militates against the finding of an unknowing plea. *Brady*, 523 U.S. at 757 (rejecting claim that plea was unintelligent based in change of law after plea). Conversely, a defendant's reliance on state agents for legal assistance may invalidate the plea. *C.f. id.*, *citing Von Moltke v. Gillies*, 332 U.S. 708, 725 (1948) (overturning conviction where defendant did not "intelligently and understandingly" waive her rights while "dependent upon government agents for legal counsel and aid").

Second, a defendant must understand the punishment he faces from the plea. *Davison v. State*, 405 S.W.3d 682, 686 (Tex. Crim. App. 2013) (explaining that defendant induced to plead guilty in ignorance of the range of punishment "has suffered a violation of procedural due process"), citing *Smith v. O'Grady*, 312 U.S. 329 (1941). Thus, a court cannot induce a plea of guilty by advising the defendant he is eligible for probation when probation is not within the range of punishment for the charged offense. *See Ex parte Williams*, 704 S.W.2d 773, 776-78 (Tex. Crim. App. 1986) (granting relief to applicant where applicant—and apparently prosecutor and defense attorney—did not know he was ineligible for probation and court had

incorrectly admonished that he was). Likewise, a defendant is entitled to know his eligibility for parole, or not, that results directly from his guilty plea to the charge. *C.f. Ex parte Moussazadeh*, 361 S.W.3d 684, 690-92 (Tex. Crim. App. 2012) (contrasting parole attainment with parole eligibility and requiring understanding of latter for plea in context of involuntary plea under IAC claim).

Applying this law to Michael's case shows his plea cannot be accepted as an intelligent admission of guilt. Michael did not understand two direct consequences of his guilty plea: whether or not the sentences against him could be stacked upon conviction, and whether the jury could sentence Michael. Both misunderstandings derive directly from the anti-admonishment.

a. The sentences could not be stacked.

Michael incorrectly believed the court could stack sentences for both counts. He believed it because the trial court ordered Michael's attorney to explain consecutive sentencing to Michael when Michael confirmed he wanted a trial and because the court then warned Michael that it would sentence him and that "I and I alone" would decide whether to stack the sentences against him. (RR: 27-28, 30.) But if convicted on both alleged counts, the sentences could not have legally been stacked in this case. With this point the Eighth Court agrees. *See also* TEX. PENAL CODE § 3.03.

The Eighth Court, however, dismisses the error, reasoning that the trial judge told Michael it could stack him whether he went to trial or pleaded guilty, so the error

could not have influenced Michael's decision to plead. Op. at *10. In other words, the lower appellate court ignores the right to trial and assumes Michael will be found guilty; it then decides the issue turns on Michael's understanding—mistaken or not—of who will sentence him. This is not the correct legal standard. If anything, it would relate to a harm analysis.

The correct inquiry is whether Michael pleaded guilty, waiving his valuable right to trial, while understanding all of the consequences of that decision. He did not. After all, one direct consequence of Michael's plea was his eligibility for cumulated sentences. Contrary to what the trial judge told him, Michael did not face stacking. He had the right to make his decision knowing that. Instead, Michael, who minutes earlier declared his intent to go to trial, decided to plead guilty under the spurious specter of stacking. The impact of this misunderstanding on Michael's decision-making calculus is magnified by the trial court's misstatements of law that it, not the jury, would necessarily sentence Michael.

b. The jury could have sentenced Michael.

By the time Michael pleaded guilty, he incorrectly believed the jury could not sentence him in his case. During the anti-admonishment, both the prosecutor and the judge stated Michael could no longer elect the jury for punishment, Michael's express preference. (RR: 30.) Further, the trial judge stated that he would sentence Michael even if Michael pleaded guilty directly to the jury. (RR: 33.) The Eighth Court erroneously approves these statements of law to overrule Michael's due process

arguments pertaining to his understanding of whom he could choose to decide punishment. Op. at *10-*12.

**The election:** A defendant may elect in writing to be sentenced by the jury at any time before voir dire begins. TEX. CODE CRIM. PRO. Art. 37.07 § 2(b). Voir dire had not begun, so Michael could have elected the jury to sentence him. *See id.*

The Eighth Court gets this point wrong by relying on *Postell v. State*, 693 S.W.2d 462 (Tex. Crim. App. 1985), to hold that a defendant waives his right to elect the jury for sentencing if he does not do so by the 28.01 hearing, which the court held in this case. Op. at *11. The problem with this is that *Postell* analyzed a prior version of Article 37.07. At that time, the defendant had to make an election before his or her initial plea. *Postell*, 693 S.W.2d at 465. Now, the defendant can make the election at any time before the start of jury selection. Tex. Code. Crim. Pro. 37.07. *See also In re State ex rel Tharp*, 393 S.W.3d at 756 (explaining "Article 37.07 now provides that the defendant must elect a jury for punishment before the commencement of voir dire"). Plus, Article 37.07 specifically addresses the timing of the election, whereas 28.01 speaks generally of pleadings; and, finally, the legislature rewrote 37.07 in 1985, well after it last amended Article 28.01. *Id.* at note 20 (noting legislature amended timing of 37.07 in 1985); TEX. GOV'T CODE §§ 311.025-26 (prescribing that more recent statute controls over earlier one and specific language controls over general when in conflict). So whether looking to the plain language of Article 37.07, this Court's

interpretation of the article in *In re State ex rel Tharp*, or the codified rules for interpreting statutes, the Eighth Court's election ruling is wrong.

**Unitary sentencing trial:** Regarding the effect of pleading to the jury, the Eighth Court is no less confused. "A guilty plea to a jury results in a unitary trial before that jury." *In re State ex rel. Tharp*, 393 S.W.3d at 758. Thus, the jury had to sentence Michael if he pleaded guilty to it. Despite the fact that this "has been well-established law for over forty years," the Eighth Court erroneously endorses the trial court's warning to Michael that if he pleaded guilty to the jury, the court would still sentence him. *See id.;* Op. at *10, *12.

c. Michael pleaded unknowingly.

The trial court's misstatements of law deprived Michael of his Due Process right to decide to plead guilty with a full understanding of the law as it pertained to his case. Just as a defendant must understand his eligibility for parole, Michael needed to know whether he faced stacking from the judge. *See Ex parte Moussazadeh*, 361 S.W.3d at 690-92. After all, the possibility of stacking doubled the amount of jail time he faced. This concern does not disappear because Michael believed the judge could stack upon conviction whether after trial or after a plea, as the Eighth Court opines. It was a factor Michael had the right to consider in his decision to plead guilty, especially since the trial court indicated it would impose a more lenient sentence if Michael entered an open plea. (RR: 33.) Under such circumstances, trial would have appeared twice as risky.

The clearest violation, however, is Michael's mistaken belief—based on the trial court's and prosecutor's statements—that the jury could not sentence him. Michael explained the effect of this mis-information: he said, "[w]ell, in that case, Your Honor, I'd like to go ahead and take the open plea because I thought the jury would have the right to assess the punishment." (RR: 31.)

Ultimately, it cannot be said that Michael made an "intelligent choice among the alternative courses of action open to" him. *Ex parte Palmberg*, 491 S.W.3d at 807. The law allowed Michael to proceed to trial, and, if convicted, to have the jury assess punishment. Or he could have pleaded guilty directly to the jury and the jury would have sentenced him. In no case could Michael have faced stacking. The trial court wrongfully took these options and this understanding off the table and left Michael with trial and sentencing by the judge under the threat of stacking, or an open plea to the court to get an "appropriate" sentence. His an unknowing plea that resulted cannot stand. *See Ex parte Williams*, 704 S.W.2d at 776-78.

It is also relevant that Michael lacked competent trial counsel to disabuse him of the trial court's misrepresentations of law. His attorney's most significant act during the anti-admonishment was to explain stacking to Michael, the illusory threat of which the trial court then held over Michael's head. (RR: 27-33.) Without legitimate assistance, Michael accepted the prosecutor's and trial judge's statements that he had lost his right to jury sentencing. The Supreme Court alluded to competent counsel and reliance on state agents as potentially relevant to the

knowingness of a guilty plea in *Brady*. *Brady*, 523 U.S. at 757. Although not at issue there, here they reinforce the conclusion that Michael did not enter a knowing and intelligent guilty plea.

Finally, this court should consider Michael's ignorance of the law alongside the trial court's other coercive tactics. As shown in the next section, the trial court intended to induce Michael's plea of guilty. Misstating the law was simply its first step in coercing Michael to plead guilty. Had Michael not been misled as to the law above, he may have withstood the trial court's coercion.

**3. Michael's plea was involuntary.**

Michael's guilty plea offended due process because it was involuntary. Although the Eighth Court opinion mentions a defendant must plead voluntarily, it does not discuss the voluntariness of Michael's decision to plead guilty or, put another way, why Michael changed his mind about trial during the hearing. Op. at *8.

In a challenge to the voluntariness of a guilty plea, the record must show that the defendant's decision to plead guilty was a "voluntary expression of his own choice." *Brady*, 397 U.S. at 748. Thus, a guilty plea induced by the trial judge's threats, misrepresentations, or improper promises is involuntary and cannot stand. *Brady*, 397 U.S at 755 (adopting Judge Tuttle's standard for voluntariness of guilty pleas).

Indeed, judicial involvement in a defendant's decision to plead guilty creates a special due process concern. *See id.* at 751 n. 8 (suggesting a judge's threat of harsher

punishment after trial would violate due process). While it is not *per se* unconstitutional, a judge's participation in the plea process is seen as "inherently coercive." *U.S. v. Barrett*, 982 F.2d 193, 194 (6th Cir. 1992) (explaining federal Rule 11 prohibition). Judicial involvement "runs afoul of due process and fundamental fairness" when the court's role as "neutral arbiter… is compromised," when the defendant's rejection of the court's suggestions creates the possibility of bias, or when the defendant feels he may face "unhappy consequences" of displeasing the judge. *See State ex rel. Bryan v. McDonald*, 662 S.W.2d 5, 9 (Tex. Crim. App. 1983) (listing reasons courts should "avoid participation or the appearance of participation" in pleas). As a result, this Court has indicated that trial judges should avoid participating in plea discussions before the parties reach an agreement. *See Ex parte Shuflin*, 528 S.W.2d 610, 616-17 (Tex. Crim. App. 1975).

From cases where the trial judge inserts itself into the plea process, three particular themes emerge:

One, a trial judge may not threaten the defendant with a greater punishment if he insists on trial instead of pleading. *See Brady*, 523 U.S. at 751, n. 8 (noting "there is no claim that… the trial judge threatened Brady with a harsher sentence if convicted after trial in order to induce him to plead guilty"); *U.S. v. Sanya*, 774 F.3d 812, 820 (4th Cir. 2014) (vacating sentence in part because trial court intimated before the plea that defendant faced "a less pleasant sentence" if he did not plead guilty); *Commonwealth v. Carter*, 50 Mass. App. Ct. 902, 903-04 (2000) (holding judge "violates a defendant's

constitutional rights" by suggesting to defendant he can expect more severe sentence if he goes to trial); *Rogers v. State*, 243 Miss. 219, 228-30 (1962) (reversing and vacating judgment where trial court persuaded defendant to plead by giving him choice of accepting a lesser sentence or life sentence).

Two, a trial judge may not express its desire that the defendant plead guilty. *See U.S. v. Davila*, 569 U.S. 597, 611 (2013) (suggesting that deciding to plea of guilty immediately following judge's statement that pleading guilty was the "best advice" would have been a serious and prejudicial Rule 11 error);[2] *Sanya*, 774 F.3d at 821 (vacating sentence in part because trial court, who was going to sentence defendant, repeatedly urged him to accept plea); *Butler v. State*, 95 A.3d 21, 35-36 (Del. 2014) (finding error where judge repeatedly pressured parties to enter a plea agreement); *Standley v. Warden*, 115 Nev. 333, 336-37 (1999) (allowing appellant to withdraw plea where trial judge "evinced an unmistakable desire that appellant accept the offer").

Three, time matters: the less time between the alleged impropriety and the plea, the more likely a court will be to vacate the plea because of it. *See Davila*, 569 U.S. 597, 611-12 (contrasting three month delay between judge's statement and decision to plead, the delay at hand, with an immediate decision to explain that "particular facts and circumstances matter"); *Sanya*, 774 F.3d at 820 (stating fact that record gave no

[2] Although Rule 11 cases are not binding on this court and do not equate to due process claims, they are persuasive because they encompass due process concerns. *See Libretti v. U.S.*, 516 U.S. 29, 49-50 (1995) [observing Rule 11(c) codified *Boykin* requirements].

reason to suggest defendant intended to plead guilty before hearing, though he did sign a plea agreement by the hearing's end, "significantly undercuts the Government's contention").

The trial judge's anti-admonishment crossed the line in all three ways.

First, the judge made it clear to Michael that he faced a longer sentence if he went to trial. The judge did so by convincing Michael that he had no choice but to be sentenced by the judge; that the judge alone would decide whether to stack the sentences against Michael; and by telling Michael that if he went to the jury "you have a problem because I am going to sentence you" and it was not "a viable option" because, again, Michael would "come to me (the judge) for punishment." (RR: 30-33.) The judge then left Michael with one other option – to enter an open plea of guilty "today" for an "appropriate" punishment from the judge. (RR: 33.) Because the judge would sentence Michael in all three scenarios, and the judge told Michael he should not take two of them *because the judge would impose the sentence*, the only logical interpretation of the single remaining course the court left Michael is as a more favorable ("appropriate") sentence for pleading guilty.

Second, the entirety of the trial court's actions evinced its desire that Michael plead guilty. When Michael confirmed to the judge that he wanted to proceed to trial, the court responded by ordering his attorney to explain stacking before warning Michael of the difficulties of representing himself. (RR: 27-29.) Along with telling

Michael that his only choice for an "appropriate sentence" was to plead guilty that day, the trial court's preference was unmistakable.

Third, Michael decided to plead guilty in direct response to and, in fact, in the midst of the trial court's misstatements and threats. The record of the anti-admonishment demonstrates this fact conclusively.

Those factors easily establish that Michael's plea was not a "voluntary expression of his own choice." *Brady*, 397 U.S. at 748. But in addition to them, there are also the trial court's misrepresentations of the law that it employed to induce Michael's plea. *See id.* at 755 (including inducement by misrepresentations among due process violations). That Michael did not face stacking and could have either elected the jury for sentencing or pleaded guilty directly to the jury makes the court's threats far more egregious and, more importantly for this appeal, compelling to Michael as he stood before the judge. Michael's appellate counsel is not aware of another case where a judge abuses its authority so blatantly to induce a plea through misinformation.[3]

For all of those reasons, this Court cannot conclude that Michael's decision to plead guilty—induced by threat and misrepresentation from a judge who abandoned its role as a neutral arbiter—instead of facing that same judge during trial was his own.

[3] Perhaps one reason for this is that most judges would not address a defendant in this manner on the record. Richard Klein, *Due Process Denied: Judicial Coercion in the Plea Bargaining Process*, 32 Hofstra L. Rev. 1349, 1350 n. 7 (2004) (noting judges' involvement in plea discussions "are rarely transcribed").

*Brady*, 397 U.S. at 748; *State ex rel. Bryan v. McDonald*, 662 S.W.2d at 9. The involuntary plea violated due process, and this Court should vacate the judgment below.

**4. The trial court's actions harmed Michael.**

Michael plead guilty unknowingly and involuntarily because the trial court misstated the law and threatened him. The plea offended due process, so this Court must vacate the conviction and sentence unless the court finds beyond a reasonable doubt from the record that Michael would have entered an open plea of guilty even without the judge's misconduct. TEX. R. APP. PRO. 44.2(a); *Davison v. State*, 405 S.W.3d at 691.

The record convincingly shows Michael would not have pleaded but for the court's improper actions during the anti-admonishment. Michael twice stated he wanted trial. (RR: 27.) Next came the judge's threats and misstatements of law. Michael then changed his mind and pleaded guilty, citing one of the judge's misrepresentations as the reason he would plead guilty. (RR: 30-33.) As a result, this Court should grant Michael relief by vacating his conviction and sentence.

**C. Michael's Plea Violated Article 26.13.[4]**

Largely for the same reasons the trial court's threats and misstatements deprived Michael of due process, they also violated Article 26.13. TEX. CODE CRIM. PRO. Art. 26.13. The plea violated Article 26.13 in two ways:

**1.** An involuntary plea violates Article 26.13(b). TEX. CODE CRIM. PRO. Art. 26.13(b). As demonstrated above, Michael pleaded involuntarily. (RR2: 27.) His plea, therefore, violated the article.

**2.** More commonly, this Court has analyzed Article 26.13 errors relating to absent or incorrect admonishments. *See, e.g.*, *Ex parte Gibuitch*, 688 S.W.2d 868, 871 (Tex. Crim. App. 1985) (analyzing erroneous admonishment of sentencing range). The court may give the Article 26.13 admonishment orally or in writing. TEX. CODE CRIM. PRO. Art. 26.13(d). An admonishment that substantially complies with the article's requirements suffices unless the defendant shows the admonishment misled or harmed the defendant. TEX. CODE CRIM. PRO. Art. 26.13(c).

Thus, when the trial court gives an admonishment, even an incomplete or incorrect one that substantially complies with the Article's requirements, the burden shifts to the defendant to show he was harmed. *Ex parte Gibuitch*, 688 S.W.2d at 872 (finding substantial compliance first to move burden to defendant). *But see Martinez v.*

[4] This issue again brings to the fore the nature of the anti-admonishment hearing that took place below. It clearly is not a true plea admonishment, but because it directly preceded his plea and informed Michael of his rights, albeit incorrectly, the anti-admonishment implicates Article 26.13.

*State*, PD-0942(-47)-17, (Tex. Crim. App. Dec. 12, 2018 – not designated for publication) (omitting substantial compliance from discussion). A showing that the erroneous admonishment led to the decision to plead establishes harm. *See Ex parte Gibuitch*, 688 S.W.2d at 872 (rejecting claim of harm where record provided no support that defendant would have gone to trial if not for judge's error as to range of punishment).

Assuming the burden shifted to Michael, the record shows that the court's anti-admonishment harmed him by causing him to plead guilty. Michael wanted a trial until the trial court addressed him at the hearing. The court "admonished" Michael into believing the court could and probably would stack his offenses and that Michael could not elect to have the jury sentence him, pushing him to forgo his valuable right to trial.

Further, the court's statements were not only incorrect statements of the law that applied to Michael's case, they exceeded the scope of the Article 26.13 admonishment. TEX. CODE CRIM. PRO. Art. 26.13(a). Thus, the written admonishment the court subsequently provided Michael, apparently modeled on the Article's requirements, did nothing to disabuse him of the misrepresentations. (CR: 132-41.) Michael put the harm explicitly in the record when he said he pleaded guilty because he believed the jury could sentence him. (RR: 31.)

Incorrectly, the Eight Court overruled Michael's Article 26.13 contention by equating the written admonishment with compliance. Op. at *9. This court has never

held that the Article's protections are so thin; rather, this Court requires an appellate court to review the entire record to determine whether an admonishment misled the defendant. *See Burnett v. State*, 88 S.W.3d 633, 638 (Tex. Crim. App. 2002) (declaring "reviewing court must independently examine the record" to decide if admonishment misled or harmed defendant).

Lastly, the Article 26.13 errors harmed Michael by depriving him of his rights to trial and to jury sentencing harmed him. *Ngo v. State*, 175 S.W.3d 738, 750 (Tex. Crim. App. 2005) (holding deprivation of "a valuable right" is egregious harm). This court should vacate the involuntary plea. *See id.*; TEX. R. APP. PRO. 44.2(b).

## II. BY HOLDING THAT MICHAEL'S WAIVER OF THE RIGHT TO APPEAL WAS ENFORCEABLE AND BY RULING THAT THE TRIAL COURT'S MISSTATEMENTS ABOUT ITS ABILITY TO CUMULATE THE SENTENCES—MADE AS IT SOUGHT TO INDUCE MICHAEL TO PLEAD GUILTY—DID NOT INVALIDATE THE PLEA, THE EIGHTH COURT'S OPINION CREATES DIRECT CONFLICTS WITH OTHER COURTS OF APPEALS ON ISSUES NOW PENDING BEFORE THIS COURT.

Since the petition for discretionary review was drafted, this Court decided *Carson* and *Martinez*, both cases that created the splits described above.

In *Carson*, this Court reaffirmed the consideration requirement for a defendant's pre-plea, pre-sentence waiver of the right to appeal. *Carson v. State*, 559 S.W. 3d 489 (Tex. Crim. App. 2018). As shown above in Section IA, it supports Michael's contention that he did not waive his right to appeal.

In *Martinez*, this Court held that appellant did not demonstrate harm where he pleaded guilty under the mistaken belief that his sentences could be stacked against

him. *Martinez v. State*, PD-0942(-47)-17, (Tex. Crim. App. Dec. 12, 2018 – not designated for publication). Specifically, this Court found no evidence in the record that "stacking played any part in Appellant's decision to plead guilty." *Id.* at *6. Plus, this Court found the lower appellate court's reliance on the possibility of stacking after trial both too speculative and misplaced because stacking remained a possibility if the cases had been tried separately. *Id.*

In contrast, Michael's case shows that the threat of stacking, along with the other misstatements and threats from the trial court, led directly to his decision to plead guilty. Michael also learned of the possibility of stacking immediately before changing his desire for a jury trial to an open plea, whereas Martinez had been told of the possibility of stacking over the course of several proceedings. *Id.* at *2. Finally, Michael faced two counts under one cause number, and the record shows the case would have been tried in a single proceeding including both counts. Thus, there was no possibility of stacking after trial unlike in Martinez. *Id.* at *6.

## III. BY RELYING DIRECTLY ON BAD/OUTDATED LAW FOR THE TIMING OF AN ELECTION AND ON THE IMPOSSIBLE SCENARIO OF THE COURT SENTENCING MICHAEL EVEN IF HE PLEADED GUILTY TO THE JURY TO REJECT MICHAEL'S APPEAL, AND BY NOT ADDRESSING MICHAEL'S ARGUMENT THAT THE TRIAL COURT COERCED HIM TO PLEAD GUILTY AFTER HE SAID HE WANTED A TRIAL ON TRIAL DAY, THE EIGHTH COURT'S OPINION DEPARTS FROM AN ACCEPTABLE COURSE OF JUDICIAL PROCEEDINGS AND CALLS FOR THIS COURT TO EXERCISE ITS POWER OF SUPERVISION.

The Eighth Court's most serious errors are described above. They led to the court's erroneous result affirming and endorsing the trial court's egregious conduct.

Michael respectfully asks this Court to correct the Eighth Court's opinion by reversing it.

## PRAYER FOR RELIEF

Michael Buck respectfully prays this Court will reverse the court of appeals, vacate the judgment and sentence of the trial court, and remand Michael's case to the 243rd District Court of El Paso County, where a new judge presides.

Respectfully submitted,

***/s/Nicholas Vitolo***
NICHOLAS C. VITOLO
State Bar No. 24084526
500 E. San Antonio, Room 501
El Paso, Texas 79901
NVitolo@epcounty.com
Tel: (915) 546-8185, Ext. 3436
Fax: (915) 546-8186

## CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing Brief was sent by e-mail using the EFile system to the District Attorney's Office at DAappeals@epcounty.com and the State Prosecuting Attorney at information@spa.texas.gov, and mailed to the Petitioner/Appellant MICHAEL BUCK on January 22, 2019. Further, 10 paper copies will be mailed to the Court of Criminal Appeals.

BY: ***/s/Nicholas C. Vitolo***
NICHOLAS C. VITOLO

## CERTIFICATE OF COMPLIANCE

I affirm that the computer generated word count of this Brief is 7,773, excluding the sections listed by Texas Rule of Appellate Procedure 9.4; and, therefore, the petition complies with the rule's word limit.

BY: ***/s/Nicholas Vitolo***
NICHOLAS C. VITOLO